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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK, for themselves and all others similarly situated,
Petitioners,

v.

GENERAL ELECTRIC COMPANY; RCA CORPORATION RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES GE PENSION PLAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. GE'S ARGUMENT IS INDISTINGUISHABLE FROM THE ARGUMENTS IN *HUGHES AIRCRAFT v. JACOBSON* ON WHICH THE COURT GRANTED CERTIORARI

GE argues that there is no conflict in the circuits. The Petitioners in *Hughes Aircraft v. Jacobson*, No. 97-1287, cert. granted, —— U.S. ——, 118 S.Ct. 1558, 66 U.S.L.W. 3531 (April 27, 1998), felt differently, made the same arguments as GE and cited the decision of the

Second Circuit in this case as a direct conflict with the Ninth Circuit:

> The decision [in *Jacobson v. Hughes Aircraft*, 105 F.3d 1288 (9th Cir. 1997)] below rests, at bottom, on the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan. Respondents are concededly receiving their defined benefits; the challenged amendments in no way affect those benefits. Rather, respondents contend that their property rights extend to the Plan assets, and that the challenged amendments violated those rights. . . .
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> * * * *
>
> . . . Whether a defined-benefit plan has a surplus or a deficit at any given moment prior to plan termination is of no consequence to plan participants—regardless of the plan's financial health, they are entitled to their defined level of benefits, no more and no less. *See, e.g.*, [*Johnson v.*] *Georgia-Pacific*, 19 F.3d [1184] at 1189-90 [7th Cir. 1994] [4]

[4] The only exception to this general rule is expressly created by the statute itself: regardless of the level of defined benefits, employees have a "vested right" to receive benefits equal to their mandatory contributions plus an imputed rate of interest. 29 U.S.C. § 1053(a)(1), 1054(c)(2). These vesting provisions ensure that employees cannot receive less than they would have made by putting their money in a conservative, interest-bearing account, thus preventing employers from requiring employees to contribute to a plan in exchange for an unfairly low level of defined benefits, as measured by a defined *interest* rate. Nowhere, however, does ERISA authorize or entitle employees to receive any of the additional *investment* return that may have been generated by their mandatory contributions.

Here again, the Ninth Circuit brought itself into manifest conflict with the Seventh Circuit, as well as with the Second and Third Circuits, each of which also has held that "[p]articipants in a defined benefit

> plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities." *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia* [*v. GE*], 23 F.3d [828] at 831 n.2, 832-33 [(3d Cir. 1994)]. As these cases emphasize, the participants' "benefits" in a contributory defined-benefit plan do *not* include a portion of any plan assets above and beyond their defined benefits. *See, e.g., Brillinger*, 130 F.3d at 64; *Malia*, 23 F.3d at 831-33 (same). If this case had been filed in the Second, Third, or Seventh Circuits, accordingly, it would readily have been dismissed.

Petition for Writ of Certiorari, *Jacobson v. Hughes Aircraft*, No. 97-1287, pp. 16-17, 18 and n. 4, 19. The Court properly granted *certiorari* based on the conflict in circuits over whether 29 U.S.C. § 1344(d)(3), directly in *Hughes* or by incorporation into 29 U.S.C. § 1058 in this case, is an additional "exception . . . in ERISA to authorize or entitle employees . . . to receive the additional investment return [over a low and safe interest rate] generated by their mandatory contributions," *id.*, before that money is used to offset an employer's obligation to pay benefits for another group of employees through a plan reorganization.

II. GE'S CENTRAL ARGUMENT ON THE MERITS THAT THE TERM "BENEFIT" IN 29 U.S.C. § 1058 REALLY MEANS "ACCRUED BENEFIT" DISREGARDS THE DECISIONS OF THE COURT

The balance of Respondents' Brief in Opposition asks the Court summarily to accept GE's argument that the term "benefit" in 29 U.S.C. § 1058 really should be read to refer only to the naked promise of an "accrued benefit," as defined in 29 U.S.C. § 1002(23)(A), rather than the underlying plan assets which are allocable to a participant as "security" for that promise under 29 U.S.C. § 1344. This argument ignores the teachings of the Court on statutory interpretation.

West Virginia University Hospitals v. Casey, 499 U.S. 83, 111 S.Ct. 1138, 1147 (1991), holds that "[t]o supply omissions transcends the judicial function" as ". . . the purpose of a statute includes what it resolves to leave alone," id. The statutory language and policy of Congress clearly and logically defined the "benefit" of an employee which is protected by 29 U.S.C. § 1058 as the assets allocated to him under 29 U.S.C. § 1344 in the event of a current plan termination.

Congress has defined the term "accrued benefit" to refer to the naked promise to a participant of a life annuity at and after normal retirement age—whether funded or unfunded, 29 U.S.C. § 1002(23)(A). Congress has used the defined term where it desired to refer to the pension "promise," without regard to its funding status, in 29 U.S.C. § 1344, 29 U.S.C. § 1344(a)(1) ("*accrued benefit* which is derived from the participants' contributions . . . which were not mandatory contributions"); 29 U.S.C. § 1344(a)(2) ("*accrued benefit* which is derived from a participant's mandatory contributions."), and elsewhere throughout ERISA, 29 U.S.C. §§ 1002(19), 1021, 1023(d)(6)(D), 1025(a)(1), 1052, 1053, 1054, 1055, 1056, 1059(a)(1), 1082(c)(8), 1085(b)(1)(B), 1322(b)(6), 1412(b), 1421(b)(7)(B), 1422(a)(1)(B), 1425, 1441(c)(2)(B), and the Internal Revenue Code, 26 U.S.C. §§ 401, 411, 412, 414, 415. Congress has most noticeably protected only the promise of an "accrued benefit" in multiemployer plan transfers, 29 U.S.C. § 1411 (b)(2).[1]

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[1] Multiemployer plans are collectively bargained and are governed by a joint board of employer and employee representatives, 29 U.S.C. §§ 1002(37) 1301(a)(3), 1002(16)(B)(iii), 186(c)(5.). These plans generally involve fixed contributions by a number of employers, *Connolly v. PBGC*, 581 F.2d 729, 731 (9th Cir. 1978); *Penn v. Howe Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990). Employee contributions and reversion of assets to employers are unknown in such plans due, among other things, to the difficulty of dealing with employee authorizations and payroll deductions and

GE's purported distinction between "assets" and "benefits" does violence to the statutory language as well as the asset allocation process underlying 29 U.S.C. §§ 1058, 1344. If the simple term "benefit" already excluded statutory rights to payment, the limiting phrase "under the plan" as a modifier of "benefits" in 29 U.S.C. § 1344(a)(6) would be compleely superfluous—even though *Mead Corp. v. Tilley*, 490 U.S. 714, 722-723, 109 S.Ct. 2156, 2162 (1989), attributes meaning to it. See also, *Rettig v. PBGC*, 744 F.2d 133, 138 (D.C. Cir. 1984) (PBGC views qualifying language "under the plan" as limiting benefits under 29 U.S.C. § 1344(a)(6) to "contractual" benefits as opposed to statutory rights).[2]

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division of any residual assets with multiple past and current contributing employers.

Congress has not provided rules for allocating assets to individual pension liabilities in multiemployer plans. The law instead simply requires a multiemployer plan to continue paying annuity benefits with sequential limitations and reductions down to the level of PBGC guarantees until it runs out of money. 29 U.S.C. §§ 1421(c), 1425, 1426(a), 1441. At that point, PBGC takes over with its guarantee, 29 U.S.C. §§ 1322A, 1431. Multiemployer plans are correspondingly excluded from 29 U.S.C. § 1058 by its last sentence.

[2] The reliance placed on references to "accrued benefits" in regulations under 26 U.S.C. § 414(1) in *Malia* and other precedent is misplaced. The 414(1) regulations were issued in 1979, T.D. 7638 (August 16, 1979) and have not been updated. The IRS has acknowledged that references to "accrued benefits" are obsolete in light of the addition of protection for contingent benefit obligations (even though they are not "accrued benefits") in 1984 through 29 U.S.C. § 1054(g)(2) and 26 U.S.C. § 411(d)(6). See, Rev. Rul. 86-48, 1986-1 C.B. 216, and Rev. Rul. 85-6, 1985-1 C.B. 133 (contingent obligations must be valued under 26 U.S.C. § 414(1) despite language of regulations). C.f., *PBGC v. Piggly Wiggly Southern, Inc.*, 19 E.B.C. 1163, 1166-1167 (N.D. Ala. 1995) aff'd 91 F.3d 164 (11th Cir. 1996) (table) (PBGC regulation can no longer be applied as written due to intervening statutory change in Internal Revenue Code). If the IRS intended to adopt the view, accepted in *LLC Corp. v. PBGC*, 703 F.2d 301 (8th Cir. 1983), that employee money should be applied to benefits first so as to leave all residual

The omission of the word "accrued" to modify "benefit" in 29 U.S.C. § 1058 for single-employer plans is instead a considered and intentional choice of language and policy by Congress.

Congress did not use the term "accrued benefit" in Section 1058 and provided instead only for a benefit defined by an allocation of existing plan assets. If the statute read as GE proposes to amend it, employers who sponsor underfunded plans would be obligated immediately and fully to fund all promised retirement checks—in order to assure that each employee would receive his "accrued benefit" if the plan terminated immediately after the merger or transfer—as a condition to any merger or transfer of pension plans. Mergers and transfers of underfunded plans predictably would come to a screeching halt and deprive the economy of flexibility which it needs to allow benefit changes in the context of corporate reorganizations.

GE surely would object to a mandate for immediate funding of all pension promises as a condition to a merger or transfer in an underfunded plan. It nonetheless objects to a converse obligation to give employees the benefit of the investment of their contributions in an overfunded plan. The short-sighted opportunism in the rule advocated by GE was rejected by Congress in its choice of an asset allocation test for Section 1058 and the emphatic purpose of 29 U.S.C. § 1344(d)(3) to assure that employees receive the fruits of investment gain by a pension plan to which they have contributed.

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assets to the employer in its regulations, that approach likewise became obsolete with the Congressional decision to enact 29 U.S.C. § 1344(d)(3) in 1987. As explained in *H.R. Report 100-391*, reprinted [1987] U.S. Code Cong. & Admin. News at 2313-104, this change reversed *LLC Corp.* and such views to assure that there will "virtually always be a distribution to participants and beneficiaries" of residual assets of a pension plan to which they have contributed.

CONCLUSION

The Court should grant *certiorari* or hold this case pending disposition of *Hughes Aircraft v. Jacobson*. If the Court determines that employees have a right to protection of assets attributable to their employee contributions against dilution in a merger or transfer, the case should be remanded for further proceedings in accordance with the decision of the Court.

Respectfully submitted,

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